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No. (1) 08-421

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In The Supreme Court of the United States

JOHNNY RAY PHILLIPS,

Petitioner,

v.

GASTON COUNTY; JAN WINTERS, in his Official Capacity as County Manager for Gaston County; GASTON COUNTY POLICE DEPARTMENT; and WILLIAM J. FARLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth Circuit used the incorrect standard in conflict with this Court's opinions and that of other Courts of Appeal when it held that Phillips had no property interest in continued employment arising from the state statute and from the implied agreement.

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner states that he is an individual and that there are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Johnny R. Phillips respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unofficially reported at 278 Fed. Appx. 276 (4th Cir. May 22, 2008) and is reproduced at App. 1a-3a. The order of the Fourth Circuit denying Mr. Phillips' petition for rehearing and for rehearing *en banc* is not reported, but is reproduced at App. 35a-36a. The memorandum and order of the United States Magistrate Judge for the United States District Court for the Western District of North Carolina is unofficially reported at 2007 WL 922921 (W.D.N.C. March 26, 2007) and is reproduced at App. 4a-32a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the magistrate judge's order, was entered on May 22, 2008. A timely petition for rehearing was denied on June 30, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order denying the petition for rehearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant North Carolina statutory provision is *An Act Relating to the Gaston County Police Department*, Pub. L. No. 1983-904, H626. § 3 (1983), which is reproduced at App. 37a-47a.

STATEMENT OF THE CASE

Facts Relevant to Petition

During his tenure of twenty-three years, Johnny R. Phillips advanced to the rank of "major" with the Gaston County Police Department ("GCPD") while gaining a reputation for being "highly respected" and a "dedicated-worker" that is "fully committed to his job." William Farley, who was named "major" around the same time as

Phillips, was named "interim chief" upon the retirement of the predecessor chief. Both Farley and Phillips applied for the vacant "chief" position. During the interview process for the chief position, Phillips provided his candid appraisal of the leadership at GCPD, which presented Farley in an unflattering light. Farley was eventually named chief of the GCPD.

Within a couple weeks of being named chief, Farley placed Phillips on "administrative leave" to investigate "concerns" about whether Phillips made undisclosed "threatening" comments about Farley. At no time did Farley ever disclose the alleged "threatening" comments to Phillips or otherwise inquire with Phillips as to whether any of the allegations were true. Phillips denied that he ever made any threatening comments to or about Farley at any time.

Farley placed Phillips on "administrative leave" and asserted that the length of the leave would be dependent upon the following circumstances: 1) that an "investigation and findings" would be completed regarding Phillips' alleged behavior; 2) that Phillips would schedule an initial consultation with Law Enforcement Services, Inc. ("LESI"), a police psychologist; and 3) that Phillips successfully complete a "fit for duty" evaluation from LESI and that a "satisfactory report and recommendation" be received.

Phillips scheduled an appointment with LESI and completed a "fit for duty" evaluation with Dr. Marshall. A genuine issue of material fact exists in

this case as to whether Farley received a "satisfactory report and recommendation" from LESI.[1] GCPD policy requires that Farley conduct an investigation concerning the allegations about Phillips and to make a finding and conclusion "within a reasonable time" or return Phillips to work. However, even after a period of two years, Farley failed to take any steps to "investigate" or otherwise attempt to substantiate the alleged "threats" attributed to Phillips or even inquire with Phillips as to whether any threats were made.

About three weeks after he was placed on "administrative leave," Phillips received a call from the assistant county manager, Rob Beasley. At Beasley's request, Phillips agreed to meet with him at a local restaurant for lunch. Beasley admitted to Phillips that he did not see any ground for disciplinary action against him. Beasley informed Phillips of two options for returning to duty: 1) Phillips could return to work by accepting a "voluntary demotion" to the rank of captain, lose $1,900.00 in salary, and all of "this medical stuff" would "disappear" from his personnel file; or 2) GCPD would issue Phillips an "involuntary demotion" to the rank of captain, Phillips would lose $20,000.00 in yearly salary, and the "medical stuff" would remain in Phillips' personnel file.

Phillips, who was never informed of any specificity as to what the alleged threats were, now began to understand what the "administrative leave"

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[1]A detailed factual statement concerning the genuine issue of material fact is not necessary due to the issue in this petition being limited to the "due process" claim.

situation was all about. Based on Beasley serving as a negotiation proxy for Farley with the apparent ability to return to Phillips to work at any time, Phillips became aware that Farley was setting him up to force a demotion or termination onto Phillips. Phillips became anguished after learning about the scheme to circumvent the "for cause" protections that GCPD employees had from demotions or terminations, under explicit GCPD policy and by North Carolina statute. App. 37a-47a. Following his meeting with Beasley, Phillips was in need of therapy due to the inherent stress of being "set up" for a demotion or termination. At this point, Phillips was not able to return to work so long as Farley were to continue to circumvent the "for cause" protections by forcing a demotion or termination on Phillips.

After Phillips met with Beasley, Farley switched Phillips from being on paid "administrative leave" to being on unpaid "administrative leave" pursuant to GCPD policy (but allowed to use sick leave benefits for pay). Significantly, Farley placed no time limitation on when the unpaid "administrative leave" would expire. While on unpaid "administrative leave," Phillips made attempts to obtain the specific allegations as to what "threats" had been attributed to him, but to no avail. Farley would not release the alleged details to Phillips, nor would Farley complete or otherwise take any steps in completing the "investigation." At some point about twenty months after being transferred to unpaid administrative leave, Phillips' accrued time for sick leave became exhausted. Within a few days after the sick leave became exhausted, Gaston County's human resources

director sent Phillips a letter to inform him that he had been terminated because his "leave balance" had been exhausted.[2] The letter did not provide Phillips with any notice of any rights to appeal the decision to the Civil Service Commission, pursuant to the rights contained in the Act. Once any leave time was exhausted, then under GCPD's policy, Phillips should have remained on unpaid administrative leave until Farley completed the "investigation."

Even if Phillips were no longer on unpaid "administrative leave" (even though his accrued paid sick leave had expired) then under GCPD policy, Phillips was entitled to receive oral and written warnings before being terminated. GCPD policy explicitly classified the "absence without proper notification to the employer" as being a performance-related inadequacy that protected Phillips from termination until after he had received the required oral and/or written warnings. Shortly after the termination, Phillips' therapist had cleared him to return to work.

Phillips filed an internal grievance with the Gaston County Personnel Commission. At the hearing, the chairman preliminarily concluded that Phillips was cleared to return to work because the met the conditions that Farley had set. At the hearing and for the first time ever, Phillips received (under Gaston County's objection) a copy of the purported allegations that had been made about him. The hearing, however, was never completed

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[2]Note that the Act, however, places the exclusive authority to terminate employees on Farley, as chief of police.

(i.e. Phillips never had the opportunity to put on any evidence) because the chair continued the hearing indefinitely to have Beasley testify about the lunch meeting with Phillips were the voluntary/involuntary demotions option was discussed. Notably, at this hearing, the county attorney---who advocated at the hearing on behalf of the county---went in to executive session with the Commission at the same grievance hearing outside the presence of Phillips to confer about the hearing.

About one week after the partial grievance hearing, a Gaston County official contacted the chair *ex parte* and instructed him that the matter needed to be dismissed because Phillips had filed a (the present) civil action against Gaston County, et al. Even though there was no authority requiring that the grievance be dismissed, the Gaston County Personnel Commission dismissed Phillips' grievance, as instructed by a Gaston County official.

Proceedings Below

Phillips sued Gaston County and Farley asserting claims under § 1983 for due process and equal protection violations of the Fourteenth Amendment in addition to state constitutional claims and tort claims. The parties consented to the exercise of jurisdiction by the magistrate judge pursuant to 28 U.S.C. § 636(c). The magistrate judge granted defendants' motion for summary judgment on all counts. As to Phillips' claims for violations of due process, the magistrate judge found that the North Carolina General Assembly did not grant Phillips a property interest in his employment

when it enacted the *An Act Relating to the Gaston County Police Department,* Pub. L. No. 1983-904, H626. § 3, N.C. Sessions Laws of 1983. App. 37a-47a. Even though the Act mandates *inter alia* that the Civil Service Board adopt rules to "insure a meaningful due process hearing" (App. 44a) and limits the chief's discretion to terminate employees (App. 40a), the magistrate judge opined that Act does not abrogate North Carolina's common law adherence to being an "At will" employment state for GCPD employees. The Fourth Circuit panel affirmed *per curiam* the order for summary judgment by adopting the reasons stated by the magistrate judge. App. 1a-3a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THAT OF OTHER CIRCUITS FOR DETERMINING WHEN A "PROPERTY INTEREST" IS CREATED IN FOURTEENTH AMENDMENT "DUE PROCESS" JURISPRUDENCE.

Procedural due process ensures that a state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision. U.S. CONST. amend. XIV, § 1. A plaintiff's federal constitutional right of due process depends on plaintiff having had a property right in continued employment. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Property interests in employment are created by existing rules or understandings that stem from an independent

source, such as state law, rules or understandings that secure benefits and that support claims of entitlement to those benefits. *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972).

A. Review is Necessary to Resolve the Conflict between the Fourth Circuit's Standard for Determining the Creation of a "Property Interest" with the Standard that the Court and other Circuits have Held.

In *Town of Castle Rock*, this Court noted that "[o]ur cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Other Circuits have similarly held that a law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged. *See Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1502 (10th Cir. 1984); *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Wells Fargo Armored Service v. Georgia Pub. Ser. Comm.*, 547 F.2d 938, 942 (5th Cir. 1977); *Lake Michigan Col. Fed. Of Teachers v. Lake Michigan Comm. Col.*, 518 F.2d 1091, 1095 (6th Cir. 1975); *Hayward v. Henderson*, 623 F.2d 596, 597 (9th Cir. 1980). As evident by the rulings of this Court and that of other circuits, the true standard for finding a property interest is finding "substantive restrictions" on the ability of an employer to terminate an employee.

In the case *sub judice*, Phillips asserts that the basis for his "property interest" in his employment with GCPD arises from the substantive rights contained in the Act. *See* App. 37a-47a. The Act establishes that members of the GCPD "shall be under the control and direction of and shall be responsible to the Chief of Police for the proper conduct of the various duties of the Department."[3] App. 40a. If the North Carolina General Assembly had intended for the members of the GCPD to be "at will" employees, the legislative body would have easily asserted that members of the GCPD work at the pleasure of the chief of police, or something to that effect. However, the Act contains no such language.

Instead, the Act states "[t]he Chief of Police may discipline, suspend or terminate any officer of the Department for any misconduct in office, or for any infraction of the rules, regulations or procedures established by the Chief of Police and approved by the Board of County Commissioners. *Id.* Clearly, the Act restricts the grounds for which Farley could terminate Phillips. Instead of the "at-will" standard where an employer can terminate an employee "for arbitrary, irrational, indifferent, or illogical reasons without any legal recourse, the Act limits Farley from having the unbridled discretion to terminate members of the GCPD. Under the language of the Act, Phillips did not "work at the pleasure" of Farley. Farley's discretion to terminate Phillips was limited to his establishing misconduct in office or an

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[3]Hence, only the Chief of Police has the authority to terminate members of the GCPD under the "cause" items provided therein.

infraction of the rules, regulations or procedures; hence, some kind of "cause."

The Fourth Circuit's standard departed from the standard set forth in this Court's decision in *Town of Castle Rock*. In departing from this Court's standard, the Fourth Circuit acknowledged that the substance contained in the Act is "capable of being interpreted" as one that "affords a property interest in employment." App. 28a-29a. But, the Fourth Circuit asserted that the content of the Act is likewise capable of being interpreted as "one which merely lists reasons for which Chief Farley could dismiss Plaintiff." *Id.* Note that when using the standard set forth in *Town of Castle Rock*, the second possible interpretation can still establish a "property interest" in one's employment. If the "listing of reasons" limited Farley's otherwise unlimited discretion to terminate employees for any reason, even no reason or an illogic reason, then a property interest is established under this Court's standard and that of other circuits. However, the Fourth Circuit, while acknowledging that a "property interest" could legitimately be interpreted from the Act, opted instead for the second interpretation under the false assumption that the second assumption automatically excludes the prospects of establishing a property interest. The Fourth Circuit asserts that North Carolina's "manifest commitment to the doctrine of employment at will" calls for it to find that the second interpretation excludes a property interest.

App. 28a. Of course, this assertion commits the logical fallacy known as *begging the question*.[4]

The Fourth Circuit's ruling in this case conflicts with the rulings from the Seventh Circuit, which has found property interest rights from statutory language substantially similar to that in the case at bar. In *Boehning*, the statute provided that "[a]ny employee *may* be dismissed, demoted, suspended or laid off for cause." *Indiana State Employees Association, Inc. v. Boehning*, 511 F.2d 834, 837-38 (7th Cir. 1975)(emphasis added). Unlike in the case at bar, this provision *Boehning* was not the exclusive substantive statute for termination. Nonetheless, the Seventh Circuit held that "[t]he specification of authority to discharge for two types of grounds . . . of the Act clearly implies exclusion of other grounds" and found that the plaintiff had a property interest in his employment. *Id*; *see also Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974)(a plaintiff must show a substantive restriction on the hospital's discretion, namely, that reappointment may be denied only for certain reasons under state law).

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[4]The Fourth Circuit's standard also conflicts with the well-established canons of statutory interpretation, such as the "plain meaning" doctrine and the maxim that "the expression of one thing implies the exclusion of another thing ("*expression unius est exclusion alterius*"). *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)("where the language of a statute is clear and unambiguous, we apply its plain meaning"); *Appeal of Blue Bird Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953).

Moreover, the Fourth Circuit's opinion conflicted with this Court's long-standing ruling in *Reagan v. United States*, 182 U.S. 419, 424 (1901)(*cited in Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). In *Reagan*, this Court found that the commissioners had a property interest in their employment by the state act that read: "[p]rovided, [t]hat the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law." *Id.* at 538. The phrases "subject to removal" and "for causes prescribed by law" as used in this context is permissive in a manner substantially similar to the word "may," as used in the case at bar.

The Fourth Circuit stated that the provision "should" have been clear that the enumerated grounds for termination were "the only reasons for which an officer of the Department may be terminated." App. 30a. Aside from the fact that the Fourth Circuit specifically *acknowledged* that a reasonable interpretation could be made that the Act provided property rights in employment, the provisions in the Act, when considered with other tenants of North Carolina law undoubtedly establish that the listed grounds were the "only reasons" for which a member could be disciplined. This analysis begins with the fact that in North Carolina, counties have no power, except that which In North Carolina, counties exercise only such general supervision and control of county affairs as are prescribed by law. N.C. CONST. art. 7, § 2. Statutorily granted powers to counties are to be strictly construed. *Davidson*

County v. City of High Point, 321 N.C. 252, 362 S.E.2d 553 (1987). The county manager had no power to suspend or terminate Phillips since his appointment was provided for by the Act. N.C. GEN. STAT. § 153A-82(1). Accordingly, the only way that Phillips could have been terminated were for those reasons *expressly enumerated* in the Act. If the General Assembly had intended for the GCPD members to be "at will" employees, it would have made it clear in the Act. The Fourth Circuit's opinion conflicts with well-established law when it writes additional grounds for termination that are not contained in the statutory language, particularly when the statutory powers are to be strictly construed.

B. Review is Necessary to Resolve the Conflict Arising from the Fourth Circuit's Failure to Follow this Court's Ruling in *Perry v. Sindermann*.

This Court has recognized that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . mutually explicit understandings that support his claim of entitlement to the benefit . . ." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Providing proof of a "mutually explicit understanding" GCPD specifically acknowledges the "property interest" that its members have in their employment. Policy 26.1.3 of the GCPD policy manual explicitly provides that "[n]o permanent employee subject to this policy shall be discharged, suspended, or reduced in pay or position, except for *just cause*." App. 49a (emphasis added). This policy is explicitly signed by Chief

Farley.[5] App. 74a. Referencing the parlance of *Roth*, there is no "unilateral expectation" of a property interest—the property interest has been recognized by the GCPD. Indeed, the GCPD (and Farley himself) recognized the "just cause" rights that Phillips had in his employment in their own policy and procedures. As such, the Fourth Circuit ignored this Court's standard of looking at the "mutually explicit understandings" that support a claim for entitlement to the benefit, separate and apart from the statutory language.

C. Review is Necessary to Resolve the Conflict between The Fourth Circuit's Narrow Reading of What Creates a "Property Interest" with the More Expansive Interpretations by this Court and by Other Circuits.

This Court has held that the definitions for "liberty" or "property" should be generally construed with broad and expansive meanings. *Bd. Of Regents v. Roth*, 408 U.S. 564, 571-72, 576-78 (1972); *Accord Woods v. City of Wilmington*, 125 N.C. App. 226, 480 S.E.2d 429 (1997). In *Roth*, the Court observed that "[t]o have a property interest in a benefit, a person must have more than an abstract need or desire for

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[5]Due process property interest in public employment can be created by ordinance or *implied contract*. *Woods v. City of Wilmington*, 125 N.C. App. 226, 480 S.E.2d 429 (1997)(emphasis added); *see also Kingsford v. Salt Lake City School Dist.*, 247 F.3d 1123 (10th Cir. 2001)(presumption that employment without definite term of duration is at-will may be overcome by affirmative showing by employee that parties impliedly agreed to terminate relationship for cause alone).

it or a unilateral expectation of it, and he must have a *legitimate claim* of entitlement to it, it is a purpose of ancient institution of property to protect those claims upon which people *rely* in their daily lives . . ." *Roth*, 408 U.S. at 577 (emphasis added). This Court recognized that "property interests" may take many forms. *Id.* at 576. Indeed, this Court's holding in *Roth* recognized the principal that a "property interest" in public employment applied to a teacher who had been only recently hired without tenure or a formal contract, but who nonetheless had a "clearly implied promise of continued employment." *Id.* at 577 (quoting *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Significantly, the Fourth Circuit acknowledged that the Act "on its face could have been read to provide a property interest in employment. App. 29a. However, the Fourth Circuit iterated that the provision of law is likewise capable of being interpreted as "one which merely lists reasons for which Chief Farley could dismiss the Plaintiff" *Id.* The Fourth Circuit concluded that since the Act capable of two interpretations and given that North Carolina is committed to the doctrine of employment at will, then the "provision must be read as to list reasons, among others, for which Chief Farley may dismiss and employee, not as one creating a property interest in employment." *Id.*

The Fourth Circuit failed to construe "property" using a broad and expansive meaning. Instead, the Fourth Circuit did the opposite: it narrowly construed "property" even though it

acknowledged that "on its face" the Act could have been read to provide a property interest in employment. The Act states precisely the opposite: the Act explicitly refers to the due process rights of the members when it states "[t]he Civil Service Board shall adopt procedural rules, subject to the approval of the Gaston County Board of Commissioners, which are sufficient to *insure a meaningful due process* hearing for any officer who requests a hearing prior to the enforcement of a disciplinary order." App. 44a (emphasis added). Not only was Phillips never provided with any *meaningful* due process hearing, but Phillips was never once even questioned about whether the allegations were true or false.

D. Review is Necessary to Resolve the Conflict Arising from the Fourth Circuit's Providing Undue Deference to State Law to Determine a Matter of Federal Constitutional Law Contrary to the Holding of this Court.

"Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-57 (2005)(emphasis in original); *see also Salve Regina College v. Russell*, 499 U.S. 225, 230-31 (1991). While the Fourth Circuit correctly found that North Carolina is an "employment at will" state, it incorrectly found that the North Carolina's "employment at will" doctrine essentially trumped a

statutory provision that limited the discretion of the chief to terminate the employment of members of the GCPD. The Fourth Circuit's ruling in the case at bar conflicts with this Court's ruling in *Town of Castle Rock* and that of other circuits by deferring a matter of federal constitutional law to the pre-existing "employment at will" state doctrine.

The Fourth Circuit reliance on this Court's holding in *Bishop v. Wood*, 426 U.S. 341 (1976) is specious. App. 26a. *Bishop* involved a city ordinance that provided, in relevant part, "[i]f a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager." *Id.* at 344 n. 5. Based on its understanding of state law, the district court had concluded that the employee had no protected property interest in the position. *Id.* at 345. The Supreme Court affirmed that determination, noting that although on its face the ordinance "may fairly be read as conferring" a guarantee of continued public employment . . . such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." *Id.*

The Fourth Circuit misapplies the holding in *Bishop* when it held that because the Court construed the *Bishop* ordinance as merely conditioning a right to removal on procedural compliance, the instant ordinance should likewise be interpreted. However, while paying homage to it,

the Fourth Circuit in its application overlooks that *Bishop* was based largely on the principle of deference to the district court's interpretation of state law—a principle that the Court has since abolished. *See Salve Regina College*, 499 U.S. at 230-31; *Town of Castle Rock*, 545 U.S. at 756-57. After noting, for example, that the district court's construction of the statute was upheld by the Fourth Circuit, "albeit by an equally divided court," the Court observed that it had in comparable circumstances "accepted the interpretation of state law in which the district court and the court of appeals had concurred even if an examination of the sate-law issue without such guidance might have justified a different conclusion." *Bishop*, 426 U.S. at 345-46 & n. 10. While this Court acceded to the district court's interpretation it did so with the explicit caveat, noted above, that the ordinance also could "fairly be read" as conferring a property right in continued employment.

The Fourth Circuit's deference in the case at bar to this Court's holding in *Bishop*, which has since been overruled on the basis of deferential standard conflicts substantially with this Courts holdings in *Town of Castle Rock* and *Salve Regina College*. Notably, the Fourth Circuit in the present case cited the *Still v. Lance* case to express the erroneous standard for a property interest: "The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee . . ." (App. 25a). Note that this standard is not the correct standard

as set forth by this Court where the true standard for finding a property interest is finding "substantive restrictions" on an ability of an employer to terminate an employee. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-57 (2005). As a result, this Court's review of the Fourth Circuit's decision in the case at bar is necessary to clarify the correct standard that all circuits and states should apply when evaluating whether a "property interest" in continued employment has been created by a state law, implied contract, or other valid source.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1385

JOHNNY RAY PHILLIPS,

Plaintiff - Appellant,

versus

GASTON COUNTY; JAN WINTERS, in his Official Capacity as County Manager for Gaston County; GASTON COUNTY POLICE DEPARTMENT; WILLIAM J. FARLEY,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Carl Horn, III, Chief Magistrate Judge. (3:04-cv-00538)

Submitted: February 20, 2008

Decided: May 22, 2008

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

J. Heydt Philbeck, Philip A. Collins, BAILEY & DIXON, LLP, Raleigh, North Carolina, for Appellant. Martha R. Thompson, STOTT HOLLOWELL PALMER & WINDHAM, L.L.P., Gastonia, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Johnny Ray Phillips appeals the magistrate judge's order* granting summary judgment in favor of Defendants in his action challenging the propriety of his termination from the Gaston County Police Department. We have reviewed the parties' briefs, the joint appendix, and the magistrate judge's opinion and order and find no reversible error. Accordingly, we affirm for the reasons stated by the magistrate judge. See Phillips v. Gaston County, No. 3:04-cv-00538 (W.D.N.C. Mar. 26, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the

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*The parties consented to the exercise of jurisdiction by the magistrate judge pursuant to 28 U.S.C. § 636(c) (2000).

materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
3:04 CV 538-H

JOHNNY RAY PHILLIPS,

Plaintiff,

v.

GASTON COUNTY, a county within the State of North Carolina, JAN WINTERS, in his official capacity as County Manager for Gaston County, the GASTON COUNTY POLICE DEPARTMENT, and WILLIAM J. FARLEY, both in his Individual Capacity and in his Official Capacity as Chief of Police for the Gaston County Police Department,

Defendants.

MEMORANDUM AND ORDER

THIS MATTER is before the Court on the following motions, responses, and replies:

1. "Defendants' Motion for Summary Judgment" (document #29), ". . . Memorandum of Law in Support . . ." (document #30), and supporting exhibits and affidavit (document #31) filed November 7, 2006;

2. "Plaintiff's Memorandum of Law in Opposition . . ." (document #46), and supporting exhibits and affidavits (document ##47-49) filed December 28, 2006;

3. Plaintiff's "Affidavit of William M. Tyson, Ph. D." (document #45) filed December 29, 2006;

4. Plaintiff's "Motion to Strike Expert Report and Testimony of Ronald E. Hansen" (document #37), and ". . . Memorandum of Law in Support . . ." (document #38) filed December 27, 2006;

5. Plaintiff's "Motion to Strike Hearsay Statements of J. F. Holloway" (document #39), ". . . Motion to Strike Hearsay Statements of Sharon Ewing" (document #40), and ". . . Memorandum of Law in Support . . ." (document #41) filed December 27, 2006;

6. Plaintiff's "Motion to Strike Portions of Affidavit of Interim Assistant County Manager Phil Ponder" (document #42), and "Memorandum of Law in Support . . ." (document #43) filed December 27, 2006;

7. "Defendants' Memorandum of Law in Response to Plaintiff's Opposition to Summary Judgment" (document #54) filed February 21, 2007;

8. "Defendants' Response . . . to Plaintiff's Motion to Strike Portions of the Affidavit of Phil Ponder" (document #55) filed March 9, 2007;

9. "Defendants' Response . . . to Plaintiff's Motion to Strike Expert Report and Testimony of Ronald E. Hansen" (document #56) filed March 9, 2007; and

10. "Defendants' Response . . . to Plaintiff's Motion to Strike Statements of Sharon Ewing and J. F. Halloway" (document #57) filed March 9, 2007.

The Plaintiff has not filed a Reply to the Defendants' Responses to the Motions to Strike, and the time for doing so has expired.

The parties have consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c), and these motions are now ripe for disposition.

Having carefully considered the parties' arguments, the record, and the applicable authority, the undersigned will grant the Plaintiff's four Motions to Strike, but will nevertheless grant the "Defendants' Motion for Summary Judgment," as discussed below.

I. PROCEDURAL AND FACTUAL BACKGROUND

This is an action seeking relief for an allegedly wrongful termination pursuant to state law and 42 U.S.C. § 1983, and for tortious interference with contract.

The Plaintiff began his employment with the Gaston County Police Department (the "Department") as a law enforcement officer on January 19, 1981. In August 1999, then Chief Tom McCarthy promoted the Plaintiff to the rank of Major. A few years later, in June 2001, William J. Farley was named "interim Chief," and was promoted to permanent Chief on September 5, 2002.

The Plaintiff was also interested in becoming Gaston County's Chief of Police and, toward that end, actively sought to be employed/promoted to serve in an interim Chief position so that his performance could be compared with that of Chief Farley. The Plaintiff made it known during this period prior to Gaston County's final selection of a Police Chief that he believed [interim] Chief Farley's running of the Department "adversely affected public safety." Unpersuaded, Gaston County officials ultimately chose William J. Farley, rather than the Plaintiff, to serve as Chief of Police.

A. Administrative Leave

Shortly after Chief Farley was chosen to serve as Chief of Police, on September 16, 2002, the Plaintiff began a period of medical leave reportedly

due to digestion problems and concerns about a heart condition. Around this same time, in the light most favorable to the Plaintiff, Chief Farley began to hear "rumors" of threats of violence made by the Plaintiff toward himself and other Gaston County officers.

On September 20, 2002, Chief Farley spoke with a police psychologist, Dr. Michael Cuttler of Law Enforcement Services, Inc. ("LESI"), regarding his concerns about the Plaintiff. Following this conversation Chief Farley directed the Plaintiff to return to work on September 24, 2002.

Upon the Plaintiff's return to work, Chief Farley placed the Plaintiff on administrative leave in order to investigate his concerns regarding the threatening comments the Plaintiff had allegedly made. Specifically, Chief Farley placed the Plaintiff on leave pursuant to Gaston County Police Department Policy 22.2.2,[1] providing him with the following written explanation:

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[1]Gaston County Police Department Policy 22.2.2 provides:

> A. Administrative leave is a leave of absence with or without pay granted by the Chief of Police. Such leave may be granted for officers involved in shooting situations, personal problems, or any other situations deemed appropriate by the Chief of Police. The length of leave will be determined by circumstances.
>
> B. Administrative leave must be approved in advance by the Chief of Police.

Over the past two weeks there have been numerous officers and persons who have brought to my attention some comments and statements that you have been alleged to have made. The nature and subject matter of these statements have caused a great deal of alarm throughout the department. The investigation into these accounts is continuing.

Effective September 24, 2002 you are to be placed on Administrative leave (GCPD Policy 22.2.2.). While on leave you will be paid based upon the use of your accrued sick leave.[2] The length of this leave will be dependent upon the following circumstances.

> The investigation and findings regarding this alleged behavior is complete.
>
> You are directed to make contact with LESI and schedule an initial consultation which is to be

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[2]However, on September 27, 2002, Chief Farley placed the Plaintiff on paid Administrative Leave for the time period of September 24, 2002 to October 24, 2002. On October 21, 2002, at the Plaintiff's request, Chief Farley extended this paid leave to run until November 7, 2002. Then, on November 6, 2002, again at the Plaintiff's request, the Administrative Leave was continued from November 7, 2002 to December 6, 2002, although this leave was specifically designated as using the Plaintiff's accrued sick leave – no longer as paid Administrative Leave.

> done September 27. Should you need transportation to LESI, this department will provide you with transportation to and from Greensboro.
>
> You must successfully complete a fit for duty evaluation, administered by LESI at the Department[']s cost and direction. A satisfactory report and recommendation must be received by this department before you return to active status.

At the time of the mandatory administrative leave, Chief Farley's concerns stemmed from statements of other officers that the Plaintiff had made threatening comments. The Plaintiff does not dispute that he made threatening comments, but maintains that these comments were taken out of context. He explains that he was known as a "teaser" and argues, citing the deposition of fellow officer Christopher B. Lowrance, that humor in the law enforcement community is different than that in the civilian community, that is, a comment which would seem threatening to the general public might not seem threatening to someone in law enforcement. Specifically, Officer Lowrance testified in his deposition that law enforcement humor may include jokes about guns and even shooting people which might concern lay people but would be understood as more benign by law enforcement professionals.

In spite of this allegedly unique brand of law enforcement humor, it is uncontroverted that the rumors of the Plaintiff's threats caused Officer Lowrance enough concern that he began keeping a bulletproof vest at his desk.

Regarding the first condition for the Plaintiff's return to work, in the light most favorable to the Plaintiff, it appears that a thorough investigation of the alleged threats was never completed. Chief Farley was told about the rumors of the threats, and on these rumors thought it best to place the Plaintiff on administrative leave. Thus, the Plaintiff argues that he could not return to work because one of the three conditions to his return was not fulfilled by the Defendants.

The Defendants respond, however, that there was never a need to complete the investigation because the Plaintiff was not cleared for duty, even by his own therapist, prior to the exhaustion of his sick leave. In any event, absence of a completed investigation is immaterial if the Plaintiff was lawfully dismissed prior to a determination that he was fit to return to duty.

B. <u>The Plaintiff's Medical Review and "Fitness for Duty"</u>

The Plaintiff contends that he was fit for duty in October of 2002, although he concedes that by sometime the next month his emotional condition had deteriorated, attributing the change to "Farley's ploy to demote or terminate him without cause."

In fact, the evidence demonstrates that the Plaintiff was determined not to be fit for duty after his initial consultation with LESI in 2002. After meeting with the Plaintiff twice, Dr. William R. Marshall, a clinical psychologist with LESI, wrote Chief Farley on September 30, 2002,[3] detailing his impressions. Specifically, after interviewing the Plaintiff "at some length on both September 26 and September 30, 2002," Dr. Marshall wrote:

> The results of my assessment indicate that Major Phillips is currently experiencing moderate to severe symptoms of situational stress related to his reaction to changes in his work environment. In addition, his reported medical problems may be of some concern. The public statements, some of which may have been perceived as threatening in nature and which have been attributed to Major Phillips, are of significant concern. However, in my judgement, the nature and intensity of his stress symptoms and the statements he has made, when taken in context, are not of sufficient severity as to mitigate his fundamental abilities to perform his duties as a Police Officer at this time. Major Phillips acknowledges that his reaction to his work environment is problematic and that the statements he has made, although

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[3]This letter is dated September 26, 2002 in error; the letter was actually drafted September 30, 2002.

> possibly taken out of context, are a source of concern.
>
> Major Phillips has willingly agreed to a referral to a therapist and I believe that it is reasonable to return him to duty conditionally once he is productively engaged in treatment. Consistent with our Fitness for Duty policy, we have made a referral for Major Phillips. After a satisfactory treatment plan has been filed, Major Phillips may be returned conditionally to his regular duties as soon as administratively feasible. In addition, we will monitor Major Phillips' attendance and progress in therapy and, of course, notify you immediately if any change in his status occurs and/or a reevaluation is indicated. Once he has completed treatment, we will re-evaluate this case and hopefully return him to full duty unconditionally at that time.

Contrary to the Plaintiff's assertions, Dr. Marshall did not conclude that he was then fit for duty. Rather, he only opined that " it is reasonable to return him to duty conditionally once he is productively engaged in treatment." Toward this end, LESI referred the Plaintiff to a psychotherapist (Dr. Chuck Urrey, Ph.D.). Shortly thereafter the Plaintiff began treatment with Dr. Urrey and consented to having reports of his treatment conveyed to LESI.

Although Dr. Marshall may have anticipated a conditional return to work shortly after beginning treatment, Dr. Urrey came to a different conclusion, conveying his opinion to LESI that the Plaintiff needed more time to deal with the stress in his life prior to returning to work. Rather than continuing the prescribed treatment plan, however, the Plaintiff promptly discontinued treatment with Dr. Urrey. Dr. Marshall reported the Plaintiff's decision to terminate treatment in a November 15, 2002 letter to Chief Farley, in which he wrote, inter alia:

> We received communication this morning that [Major Johnny Ray Phillips] has terminated treatment with the psychotherapist to whom he was referred. Although this communication further indicated that he had entered treatment with another psychotherapist, we are unable to establish communication with this therapist as his identity is unknown to us. Consequently, we are no longer able to monitor Major Phillips' progress and as such, are no longer able to continue to assure the Department that he continues to be fit for duty.
>
> Should you continue to have concerns about this officer's fitness for duty, we strongly recommend that you obtain an independent assessment of this officer's fitness for duty.

Following the receipt of this letter, on December 6, 2002, Chief Farley sent the following letter to the Plaintiff:

> In a letter dated November 15, 2002 this Department received notification from William R. Marshall, Ph.D. that you have terminated treatment with the psychotherapist to whom you were referred. It is our understanding that you may have sought treatment from another provider.
>
> The conditions for your return to duty remain unchanged (as stated in a letter to you dated September 24, 2002). The Department will resume administrative actions regarding this investigation when it is deemed to be most appropriate, or is found to be in the Department[']s best interest.
>
> Until then, you will remain paid through the use of your accrued sick leave.

After this communication, the Defendants received monthly letters, seventeen in all, from the Plaintiff's private therapist, Dr. John W. Long, Ph.D., who is not associated with LESI, which were all along the lines of the text of the following July 15, 2004 letter:

> This is to certify that Johnny Phillips is my patient and that he is unable to work at this time due to emotional problems. I estimate that this patient will be able to return to work on September 20, 2004.

Notably, this was the last communication received from the Plaintiff prior to the exhaustion of his accrued sick leave.

C. The Plaintiff's Termination and Appeal

On July 28, 2004, the Plaintiff received a letter from the Gaston County Human Resources Director, Bill Hargrove, stating that he had been terminated effective July 21, 2004 because his leave balance had been exhausted.[4] On August 2, 2004, the

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[4]The Plaintiff's termination was pursuant to the Gaston County Personnel Policy relating to unauthorized leave, which reads as follows:

> Employees will be considered to be on Unauthorized Leave if they do not report to work and do not have approved Annual Leave, Sick Leave, Holiday Leave, Worker's Compensation Leave, Parental Leave, Military Leave, Civil Leave, Educational Leave With Pay, or Authorized Leave Without Pay. Unauthorized leave is grounds for discharge and is covered under Policy 11.

Policy 11 provides that the following is considered an unsatisfactory work performance:

Plaintiff wrote a letter to Chief Farley and Mr. Hargrove seeking to appeal his termination. More specifically, this letter pointed out the alleged deficiencies of the procedural handling of his termination. The Plaintiff complained that, according to Gaston County policy, there should have been a pre-termination conference and that the actual termination letter should have provided more detail and should have been hand delivered. The Plaintiff argued in this letter that had policy been followed he would have been able to request an additional twelve weeks of leave under the Family and Medical Leave Act, during which he could have "resolve[d] this problem once and for all."

On September 15, 2004, Dr. Long sent a one-sentence letter "to certify that Johnny Phillips is [his] patient and that he is released to return to work Monday, September 20, 2004." This letter came after the Plaintiff exhausted over eighteen months of approved sick leave, after the Plaintiff was notified of his termination, with no LESI certification that the Plaintiff was fit for duty, and after his notification of appeal.

The appeal hearing was scheduled and began on September 17, 2004 before the Gaston County Personnel Commission, but was continued in order for the Commission to receive additional evidence prior to making a decision. However, the appeal was

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> Being absent without authorized leave, or being absent without properly notifying one's Supervisor (this may be considered a voluntary resignation resulting in immediate dismissal requiring no prior notice) . . . .

dismissed after the Plaintiff filed the instant action on September 22, 2004 in the Superior Court of Wake County, North Carolina.[5] On October 21, 2004, the Defendants removed the action to this Court.

On November 7, 2006, the Defendants filed the subject motion. Along with his response, the Plaintiff has also filed four Motions to Strike portions of the Defendants' supporting evidence for their Motion for Summary Judgment, each of which will be granted. Accordingly, the undersigned has not considered the evidence which is the subject of the Plaintiff's motions to strike.

II. DISCUSSION OF CLAIMS

A. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted when the pleadings, responses to discovery, and the record reveal that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." See also Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Once the movant has met its burden, the non-moving party must come forward with

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[5]Specifically, the Gaston County Personnel Commission met on January 4, 2005 to consider the County's request for dismissal of the grievance due to the instant action. By letter dated January 10, 2005, Bill Hargrove informed the Plaintiff that the appeal had been dismissed because "the Commission decided the Court was the proper forum to address [the Plaintiff's] concerns."

specific facts demonstrating a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). However, the party opposing summary judgment may not rest upon mere allegations or denials and, in any event, a "mere scintilla of evidence" is insufficient to overcome summary judgment. Id. at 249-50.

When considering summary judgment motions, courts must view the facts and the inferences therefrom in the light most favorable to the party opposing the motion. Id. at 255; Miltier v. Beorn, 896 F.2d 848, 850 (4th Cir. 1990); Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980). Indeed, summary judgment is only proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal quotations omitted).

B. Wrongful Termination

The merits of Plaintiff's wrongful termination claim depend on whether his position was an exception to North Carolina's general "employment-at-will" rule. In support of his argument that he was not an at will employee, the Plaintiff points to the language of "An Act Relating to the Gaston County Police Department," enacted by the North Carolina

General Assembly, Section 8, Chapter 904, Session Laws of 1983 ("the Act"), which provides:

> **Sec. 8.** All promotions within the Gaston County Police Department shall be made by the Chief of Police pursuant to policies and procedures adopted by the Board of Commissioners; provided, that promotions to any position other than that of Chief of Police shall be made by the Chief of Police after a competitive examination is administered to eligible officers.
>
> The members of the Department shall be under the control and direction of and shall be responsible to the Chief of Police for the proper conduct of the various duties of the Department. The Chief of Police may discipline, suspend or terminate any officer of the Department for any misconduct in office, or for any infraction of the rules, regulations or procedures established by the Chief of Police and approved by the Board of County Commissioners.

First, the Plaintiff's wrongful termination claim fails even if the Plaintiff was not an at will employee, which as discussed in section II(D)(3)(a) below, the Court concludes he was. The language of the Act plainly grants Chief Farley the authority to place the Plaintiff on administrative leave for misconduct, whether he was an at will employee or an employee with a more protected status. It is

undisputed that the Plaintiff made threatening comments, which caused one witness (cited by the Plaintiff for his understanding of unique law enforcement humor) to keep a bulletproof vest behind his desk.

When an employee's conduct causes such a reaction even on the part of a sympathetic coworker, certainly that conduct is properly characterized as "misconduct."

The decision to terminate, however, was not made immediately following the Plaintiff's threatening comments, and indeed, was not made by Chief Farley. Rather, the decision to terminate was made as a result of a second category of misconduct, namely, the Plaintiff's failure to report to work after the exhaustion of all sick leave.

As noted, the Plaintiff would likely have been cleared to return to work, albeit conditionally, if he had simply engaged in the treatment program prescribed by LESI, but chose instead to engage an independent therapist, and not to return to work beyond his accrued sick leave. Under these circumstances it was entirely reasonable for the County, according to its written policies, to terminate the Plaintiff, an employee who had shown no sign of returning to work (and, in fact, continued to send letters asserting his inability to return to work).

In summary, the Plaintiff's wrongful termination claim fails whether or not he was an at will employee.[6] Such a determination is immaterial when it is apparent that the Plaintiff was properly placed on leave for misconduct, and then properly terminated for failing to return to work prior to the exhaustion of his accrued leave. Rather than constituting "wrongful termination," it would be simply unreasonable to require the County to continue to hold open the Plaintiff's essentially abandoned position.

Accordingly, the Defendants' Motion for Summary Judgment must and will be granted as to the Plaintiff's wrongful termination claim.

C. Section 1983 Claims

In his Section 1983 claims against Gaston County, the Plaintiff makes two distinct arguments. First, he argues that he had a "property interest" in continued employment and was denied the due process protections of both the United States and North Carolina Constitutions when that property interest was taken. Second, he argues that as a class of one he was denied equal protection of the law.

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[6] The Defendants also raise the affirmative defense of sovereign immunity as to this claim. However, because the claim fails on its face, a determination of sovereign immunity is not necessary.

1. Procedural Due Process[7]

To establish a procedural due process violation, the Plaintiff must show that (1) he had a property interest (2) of which the Defendants deprived him (3) without due process of law. See Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 826 (4th Cir. 1995). In support of his procedural due process claim, the Plaintiff essentially argues that he was denied sufficient notice of the charges and evidence against him prior to his administrative leave and termination, and then denied any meaningful opportunity to respond to the charges or appeal his administrative leave or

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[7]Although the Plaintiff's Amended Complaint refers to only procedural due process violations, the Court notes that a substantive due process claim would also fail. To make out a claim that the Defendants violated the Plaintiff's substantive due process rights, he must demonstrate: (1) a property interest; (2) that the state deprived him of this property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. See Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995) ("substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement them"); and Rucker v. Harford County, 946 F.2d 278, 281 (4th Cir. 1991) (protection of substantive due process covers only state action which is "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any postdeprivation state remedies"). As stated above, it was rational and reasonable to place an employee making threats on administrative leave and then to terminate an employee who exhausted over eighteen months of sick leave with no signs or assurances that he would ever return to his position.

termination, to which he was entitled because he possessed a property right in the subject employment.

Regarding the existence and extent of a property interest in employment, the Supreme Court has instructed:

> [p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Accord Bishop v. Wood, 426 U.S. 341, 344-45 (1976), *overruled on other grounds*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). As the Supreme Court has further explained, "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577 (emphasis added).

The Plaintiff argues that the language of "An Act Relating to the Gaston County Police Department," enacted by the North Carolina General Assembly, Section 8, Chapter 904, Session Laws of 1983, and quoted above, excepts him from the general rule of at will employment, giving him

the requisite property interest and entitlement to continued employment. The Plaintiff is correct in his assertion that such a statute or ordinance can create a property interest in employment. See Pittman v. Wilson County, 839 F.2d 225, 227 (4th Cir. 1988) (noting statutory exception to at will employment, but finding that language in employee handbook did not qualify as exception to general rule of at will employment in North Carolina). However, the inquiry does not stop there. As the Supreme Court has explained, in a case involving North Carolina employment:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. . . . Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.

Bishop, 426 U.S. at 344-45 (citing Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971) (school teacher did

not have a property interest in continued employment, but recognizing exceptions to at will employment rule)).[8]

In Bishop, the Court examined an ordinance which, just as in this case, on its face could have been read to provide a property interest in employment. 426 U.S. at 345. However, the Court reasoned that "such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." Id. With these two potential interpretations of the ordinance, and in light of state law, the Court found no error in the district court's finding of no property interest in continued

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[8]In Bishop v. Wood, 426 U.S. at 343-47, the Supreme Court reviewed an appeal from this District on a grant of summary judgment which was affirmed by a divided Fourth Circuit panel, 498 F.2d 1341 (1974).

The District Court faced a case on all fours with this one, where a city ordinance appeared to give the discharged police officer a property interest in his employment. Bishop v. Wood, 377 F. Supp. 501, 503 (1973). The District Court found that, when considered in light of North Carolina law, the ordinance did not create a property interest in employment. Id. at 504-05.

This Court also notes that the portion of the Supreme Court's Bishop opinion which defers to a federal court's interpretation of the state law where it sits has effectively been overruled by Salve Regina College v. Russell, 499 U.S. 225, 231 (1991). However, this fact does not change the requirement that this Court give weight to precedent interpreting similar laws.

employment. Id. at 345-46. Indeed, the Supreme Court concluded by noting:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 349-50.

The facts in this case mandate the same conclusion. North Carolina has a "manifest commitment to the doctrine of employment at will." Guy v. Travenol Laboratories, Inc., 812 F.2d 911, 912 (4th Cir. 1987). As the Fourth Circuit has concluded:

> the North Carolina Supreme Court has continuously accorded employers broad freedom in employment decisions. . . . [T]he at will doctrine commands long and continued support in the North Carolina courts even in what may appear unusual and extenuating circumstances. . . . [T]he freedom of employers to dismiss employees perceived as unreliable and incompetent should not be lightly circumscribed.

Id. at 913. Given this clearly established North Carolina law, and the general hesitance of federal courts to superimpose a contrary construction,[9] the

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[9]Recognizing that unpublished authority is of limited precedential value, the undersigned notes that a more recent opinion from the Western District of North Carolina has faced the same issue of whether the language of a similar ordinance created a property interest in employment. See Shuler v. Town of Waynesville, 1999 WL 33315654 (W.D.N.C. 1999). The Shuler court held:

> based on a continuum of North Carolina decisions protect[ing] the presumption of employment at will[,] that a North Carolina court would also find that the personnel manual adopted by the Town of Waynesville would not be considered to be a grant[] of a property interest in continued public employment. While this is a harsh result, the opposite conclusion would be equally harsh: the micromanagement of routine town affairs by federal courts where no federal rights are at stake.

Id. at *3. The ordinance at issue in this case read "[a]n employee may be suspended or dismissed for causes relating to

Court concludes that this provision of law is likewise capable of being interpreted in two ways – one which affords a property interest in employment and one which merely lists reasons for which Chief Farley could dismiss the Plaintiff. Under the totality of the circumstances and applicable law, this provision must therefore be read to list reasons, among others, for which Chief Farley may dismiss an employee, not as one creating a property interest in employment.

To review the relevant language, the policy reads as follows: " The Chief of Police may discipline, suspend or terminate any officer of the Department for any misconduct in office, or for any infraction of the rules, regulations or procedures established by the Chief of Police and approved by the Board of County Commissioners."[10] In order for this language

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personal conduct detrimental to services with the Town . . . Inappropriate personal conduct such as . . . any other behavior a reasonable person would deem behavior unbefitting the Town are examples of . . . reasons for immediate suspension or dismissal." Id. at *1.

[10]Compare the language of this policy to that of North Carolina 10 General Statute § 126-35(a) which states "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . ." This language has been held to create a property interest in employment within the meaning of the Due Process Clause. Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992). However, this statute explicitly removes a class of employees from the general rule of at will employment. The provision at issue here lacks such explicitness and leaves the possibility of other reasons for dismissal open, and only refers to removal by the Chief of Police.

to change the strong preference for at will employment in North Carolina, the provision should be clear that these are the only reasons for which an officer of the Department may be terminated. However, the provision includes no such express restriction – it states simply that the Chief "may" terminate an employee for these reasons. Indeed this conclusion is reinforced by the fact that it was the Gaston County Human Resources Director, not Chief Farley, who ultimately terminated the Plaintiff's employment.

In summary, because the Plaintiff did not have a property interest in his employment, the Defendants' Motion for Summary Judgment will also be granted with respect to his due process claims.

2. Class of One

Here, the Plaintiff argues that he was discriminated against as a class of one (not as a member of a protected class). More specifically, he states that the "Defendants' acts towards Plaintiff . . . were irrational and arbitrary; motivated by ill will resulting from Plaintiff's actions not involving or

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The Howell case, cited above, is interesting as well, and essentially finds a due process violation based upon a town's failure to follow the grievance process allowed an employee in its Manual (which had been adopted as an ordinance). Id. at 417-18, 417 S.E.2d at 281-82. Interestingly, the Howell court does not find a property interest on any provision requiring "cause" for termination, but rather it bases the property interest on the provisions requiring specific grievance procedures. Id. While this is a different approach, it is nonetheless inapplicable here as the Plaintiff has not put forth allegations to support such a claim.

related to his job performance; and were based on an intentional or reckless disregard for Plaintiff's rights by singling out Plaintiff for adverse treatment."

The Supreme Court has recognized "equal protection claims brought by a 'class of one,' where the plaintiff alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). See also Willis v. Town of Marshall, 426 F.3d 251, 263 (4th Cir. 2005) (recognizing "class of one" equal protection claim). However, the Plaintiff's claim in this case cannot prevail because there was a rational basis for placing him on administrative leave and for his subsequent termination. As previously stated, placing the Plaintiff on administrative leave was rationally based on his bizarre statements, and his termination was rationally based on the Plaintiff's failure to return to work after exhausting all available sick leave. Accordingly, the Plaintiff's "class of one" claim must likewise fail.

In regard to the Plaintiff's North Carolina Constitution claims, North Carolina courts have consistently interpreted the state "due process" and "equal protection" provisions as synonymous with their counterparts under the Fourteenth Amendment. See, e.g., Simeon v. Hardin, 339 N.C. 358, 377, 451 S.E.2d 858, 871 (1994); Bulova Watch Co. v. Brand Distributors, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974); and State v. Barnes, 264 N.C. 517, 520, 142 S.E.2d 344, 346 (1965).

Consequently, the Defendants' Motion for Summary Judgment will be granted on the Plaintiff's federal and state constitutional claims for denial of due process.

D. Corum Claim

In this claim, the Plaintiff bases his argument on Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276 (1992). In Corum, the North Carolina Supreme Court recognized that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against [a State governmental entity] under [North Carolina's] Constitution." Id. at 782, 413 S.E.2d at 289. However, this claim also necessarily fails because, as discussed above, no state constitutional rights have been abridged. For this reason, the Defendants' Motion for Summary Judgment on the Plaintiff's Corum claim must and will also be granted.

E. Tortious Interference with Contract

Finally, in this claim made against Chief Farley in his individual capacity, the Plaintiff alleges that Chief Farley interfered with his employment contract with Gaston County and wrongfully induced both the County and the Department to place him on administrative leave and then terminate his employment.

In North Carolina, the elements of a tortious interference with contract claim are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Bloch v. Paul Revere Life Ins. Co., 143 N.C. App. 228, 239, 547 S.E.2d 51, 59 (2001). The Court need not even examine the other elements to this claim because it plainly fails based on the fourth element – which would require a finding that Chief Farley acted without justification. Much to the contrary, as repeatedly stated above, Chief Farley acted with rational and reasonable justification in placing the Plaintiff on administrative leave.

Nor does the evidence support the conclusion that Chief Farley caused the County to terminate the Plaintiff's employment. But, even if he did, for the reasons set forth above, the Plaintiff's termination was equally justified. Accordingly, the Defendants' Motion for Summary Judgment on the Plaintiff's tortious interference with contract claim will also be granted.

III. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Plaintiff's "Motion to Strike Expert Report and Testimony of Ronald E. Hansen" (document #37) is **GRANTED**.

2. The Plaintiff's "Motion to Strike Hearsay Statements of J. F. Holloway" (document #39) is **GRANTED**.

3. The "Plaintiff's Motion to Strike Hearsay Statements of Sharon Ewing" (document #40) is **GRANTED**.

4. The Plaintiff's "Motion to Strike Portions of Affidavit of Interim Assistant County Manager Phil Ponder" (document #42) is **GRANTED**.

5. The "Defendants' Motion for Summary Judgment" (document #29) is **GRANTED** and the Complaint is **DISMISSED WITH PREJUDICE**.

6. The Clerk is directed to send copies of this Memorandum and Order to counsel for the parties.

SO ORDERED, ADJUDGED, AND DECREED.

Signed: March 26, 2007

/s/ Carl Horn, III
Carl Horn, III
United States Magistrate Judge

FILED: June 30, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1385
(3:04-cv-00538

JOHNNY RAY PHILLIPS,

Plaintiff - Appellant

v.

GASTON COUNTY; JAN WINTERS, in his Official Capacity as County Manager for Gaston County; GASTON COUNTY POLICE DEPARTMENT; WILLIAM J. FARLEY,

Defendants – Appellees

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Michael, and Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

GENERAL ASSEMBLY OF NORTH CAROLINA
1983 SESSION

CHAPTER 904
HOUSE BILL. 626

AN ACT RELATING TO THE GASTON COUNTY POLICE DEPARTMENT.

The General Assembly of North Carolina enacts:

Section 1. The title of the law enforcement agency known as the Gaston County Police Force shall henceforth be known as the Gaston County Police Department. The purpose of the Gaston County Police Department is to secure a more effective administration of the criminal laws of the State of North Carolina and the County of Gaston, to prevent crime, to procure the speedy apprehension of criminals and to protect the lives and property of the citizens of Gaston County. Law enforcement officers of the Gaston County Police Department shall have the authority to arrest in accordance with the provisions of the North Carolina General Statutes.

Sec. 2. The Gaston County Police Department shall consist of a Chief of Police and such officers and other employees of the Department as the Gaston County Board of Commissioners shall, in its discretion, deem sufficient to protect the lives and property of the citizens of Gaston County. The compensation paid to all employees of the Gaston County Police Department shall be determined by the Gaston County Board of Commissioners through its budget process and in accordance with a pay plan

as provided by the Board of Commissioners for all employees of Gaston County government.

Sec. 3. The Chief of Police of the Gaston County Police Department shall be suspended or removed from office by the Gaston County Board of Commissioners for cause. The Chief of Police of the Gaston County Police Department shall, subject to the approval of the Gaston County Board of Commissioners, be appointed to office by the County Manager. The Chief of Police shall be directly responsible and accountable to the County Manager for the fulfillment of all the duties and responsibilities of the police department. The process used by the County Manager to recommend the appointment to the office of Chief of Police shall be one that is fair and equitable, that provides for equal opportunity for employment, that establishes a selection and appointment process based on merit and a reasonable evaluation of each candidate's qualifications, which qualifications may minimally include, but not be limited to: (1) Bachelor's Degree; (2) A minimum of four years' police administrative experience; (3) Above average physical condition and excellent state of health; (4) A psychological evaluation indicating no pathological conditions; (5) Excellent character and reputation.

Sec. 4. Applicants for employment in the Gaston County Police Department shall meet the minimum employment standards for entry level employment as a law enforcement officer in accordance with the rules and regulations established by the North Carolina Criminal Justice Education and Training Standards Commission. The

Gaston County Board of Commissioners may establish additional requirements for employment in the Gaston County Police Department, and shall make all such general rules, regulations, and requirements for the conduct and services of the employees of the Department as it may consider advisable. The rules and regulations established by the Board of Commissioners shall be printed and made available for public inspection and for use of employees of, and the applicants for, employment in the Gaston County Police Department.

Sec. 5. The Chief of Police shall be responsible for the investigation of applicants and shall prepare a list of qualified applicants for presentation to the Civil Service Board. The Chief of Police shall ensure that each applicant, whose application is submitted to the Civil Service Board for employment consideration, meets all employment standards and is well qualified for employment as a police officer. Each applicant for employment shall be thoroughly investigated as to fitness to become a police officer and such investigation shall include determinations of moral character, general reputation, absence of criminal history and other considerations necessary to a comprehensive background investigation. Each applicant shall take an oath, as required by the General Statutes, to uphold the Constitutions of the State of North Carolina and of the United States of America and to enfore the laws promulgated thereunder.

Sec. 6. Notice of the time and place for making application for employment with the Gaston County Police Department shall be given by Gaston

County in accordance with policies established by the Gaston County Board of Commissioners.

Sec. 7. Effective upon the ratification of this act, the rules, regulations and procedures under which the Gaston County Police Department operates shall be subject to the approval of the Gaston County Board of Commissioners.

Sec. 8. All promotions within the Gaston County Police Department shall be made by the Chief of Police pursuant to policies and procedures adopted by the Board of Commissioners; provided, that promotions to any position other than that of Chief of Police shall be made by the Chief of Police after a competitive examination is administered to eligible officers.

The members of the Department shall be under the control and direction of and shall be responsible to the Chief of Police for the proper conduct of the various duties of the Department. The Chief of Police may discipline, suspend or terminate any officer of the Department for any misconduct in office, or for any infraction of the rules, regulations or procedures established by the Chief of Police and approved by the Board of County Commissioners.

Sec. 9. On the first of each and every calendar month, the Chief of Police shall make out and certify to the County Manager a statement regarding the conduct of the affairs of the Gaston County Police Department, which report shall contain an evaluation of the efficiency and effectiveness of the Department and shall contain any suggestions for

improvement in the service rendered or in the personnel of the Department. Said report shall be made by the County Manager to the Board of Commissioners as soon as reasonably possible.

Sec. 10. Every police officer has a civic responsibility to support good government by every available means and in every appropriate manner. Any police officer may join or affiliate with civic organizations of a partisan or political nature, may attend political meetings, and may advocate and support the principles or policies of civic or political organizations in accordance with the Constitution and laws of the State of North Carolina and in accordance with the Constitution and laws of the United States of America. However, no police officer of the Gaston County Police Department shall (1) engage in any political activity while on duty, (2) be required as a duty of his office or employment, or as a condition for employment, promotion, or tenure of office, to contribute funds for political or partisan purposes, (3) solicit, or act as custodian of funds for political or partisan purposes, (4) coerce or compel contributions for political or partisan purposes by any other police officer of the County, or (5) use any supplies or equipment of the County for political purposes. No applicant for employment nor any police officer of the Gaston County Police Department shall be examined concerning his or her political opinions, political affiliations, voting registration or voting preference. Any violation of this section shall be deemed improper conduct and shall subject such police officer to dismissal or other disciplinary action.

Sec. 11. The Gaston County Board of Commissioners is hereby authorized to contract with the governing bodies of municipalities located within Gaston County for the provision of law enforcement service and protection within the corporate limits of said municipalities that desire to contract with Gaston County for said service.

Sec. 12. There is hereby created a Civil Service Board for the County of Gaston to consist of three members to be appointed by the Senior Resident Judge of the Superior Court of the Judicial District in which Gaston County is located, said members of the Civil Service Board to hold their office as provided in this act.

Sec. 13. The members of the Civil Service Board shall possess the qualifications of a voter of Gaston County, North Carolina, and shall take an oath (or affirmation) for the faithful discharge of the duties of their office. One of the members of the Civil Service Board shall be a citizen and resident of Gastonia township, Gaston County, and the other two members of the Civil Service Board shall be residents of townships of Gaston County other than Gastonia township. The members of the Civil Service Board shall be subject to removal from office by the Senior Resident Superior Court Judge for malfeasance, misfeasance, or nonfeasance in office, or for any violation of the laws of the State of North Carolina, or for any cause which in the discretion of the Senior Resident Superior Court Judge makes such removal in the best interest of the public.

Sec. 14. At the expiration of the term of each member of the Civil Service Board the Senior Resident Superior Court Judge shall appoint a successor for a term of three years. Any vacancy in the said Civil Service Board shall be filled in the manner herein provided for the appointment of members thereof, and the person so appointed shall serve for the remainder of the unexpired term of the member whose place he fills. Members of the board shall hold office until their successors are appointed and qualified, but, in no case, longer than 60 days. No member of the Civil Service Board, who shall have held office for a three-year term shall be qualified to succeed himself or replacement.

Sec. 15. The members of the Civil Service Board shall organize by electing a Chairman and a Secretary at the first meeting of the Civil Service Board in July of each year. The Civil Service Board shall prepare a set of rules, policies, and procedures under which the Civil Service Board shall conduct its affairs and govern its proceedings. Such rules, policies and procedures shall from time to time be reviewed by the Civil Service Board for changes and improvements. These rules, policies, and procedures and any revisions shall be subject to the approval of the Gaston County Board of Commissioners.

Sec. 16. (a) The Civil Service Board shall review the qualifications of applicants for positions as law enforcement officers with the Gaston County Police Department, and appoint to vacant positions only those applicants as are best qualified.

(b) The Civil Service Board shall hear grievances regarding charges of discrimination when such grievances are made in writing to the Civil Service Board by an individual police officer or by groups of police officers within the Gaston County Police Department. Gaston County police officers shall have the option of presenting complaints or grievances regarding discrimination to their Police Department supervisors or directly to the Civil Service Board. After hearing any such grievance, the Civil Service Board shall report its findings in writing jointly to the Chief of Police and the County Manager along with any recommendations that, in its judgment, would be in the best interests of the Police Department and of Gaston County.

(c) The Civil Service Board shall adopt procedural rules, subject to the approval of the Gaston County Board of Commissioners, which are sufficient to insure a meaningful due process hearing for any officer who requests a hearing prior to the enforcement of a disciplinary order.

(d) The Civil Service Board shall review disciplinary action taken against any officer, upon the written request of the officer for a review; provided, however, that the Gaston County Board of Commissioners shall review disciplinary action taken by the County Manager against the Chief of Police, upon the written request of the Chief of Police. The Civil Service Board shall, upon the written request of any officer against whom disciplinary action has been taken, conduct a hearing into the formal charges against the officer and shall make written findings of fact regarding the

charges against the officer. The officer, against whom charges have been filed, shall be given ample opportunity at a disciplinary hearing to be heard in his own behalf. The Civil Service Board shall report its findings and conclusions to the County Manager with its request that the County Manager implement the necessary action in accordance with its conclusions. The Civil Service Board shall find facts upon which it will base a decision that the officer against whom charges have been filed shall either be reinstated, suspended, demoted, discharged or exonerated of the charges against him. The County Manager shall review the findings and decision of the Civil Service Board. The County Manager may, no more than three times, remand the action to the Civil Service Board with directions for further findings prior to the final disposition of the Civil Service Board's decision, or if there is no reason for additional hearings before the Civil Service Board, he shall direct the Chief of Police to implement the order of the Civil Service Board.

(e) The Civil Service Board shall review the personnel policies of the Gaston County Police Department and shall make recommendations to the County Manager for revisions of the police personnel policy. The Gaston County Board of Commissioners shall review and adopt the personnel policies for the Gaston County Police Department, making such changes as it deems to be necessary and in the best interests of the Department and the County.

Sec. 17. The Chairman of the Civil Service Board shall conduct the meetings and hearings of the Civil Service Board in accordance with the rules,

policies and procedures adopted by the Gaston County Board of Commissioners. The Chairman shall prepare and deliver the annual report of the Civil Service Board to the Board of County Commissioners. The Chairman shall make such reports and recommendations to the County Commissioners and the County Manager as are provided for herein or as requested. The Secretary shall keep the minutes of the proceedings of the Civil Service Board and shall be the custodian of all the papers and records pertaining to the business of the said Board, and shall perform such other duties as the said Board shall prescribe or direct. The records of the Civil Service Board shall be open to the inspection of the public except where the inspection of said records is prohibited by law.

Sec. 18. At the first regular meeting of the Board of Commissioners in January of each year, the Civil Service Board shall make an annual report of its actions for the preceding year to the Board of County Commissioners. Said report may include any recommendations of the Civil Service Board as to the practical effects of the personnel rules or personnel system in use, together with any suggestions which the members of the said Board may deem proper for the improvement of the personnel administration of the Gaston County Police Department.

Sec. 19. The members of the Civil Service Board shall receive for their services such compensation as may be determined by the Board of Commissioners of Gaston County.

Sec. 20. All laws or clauses of laws in conflict with the provisions of this act are hereby repealed.

Sec. 21. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 21st day of July, 1983.

GASTON COUNTY POLICE

POLICY MANUAL

Revised May 14, 2002

* * * * * * * * *

26.1.1 Code of Conduct and Appearance Standards
Addresses CALEA 4th edition standards: 26.1.1

All members of the Department, both sworn and civilian, are subject to discipline under the provisions of this directive.

A. The Department shall maintain a code of conduct and appearance standards for all sworn members.

B. The code of conduct standards are identified in the Rules and Regulations of the Department. (See Chapter-91, 91.1.1 and 91.1.2 "Rules and Regulations".)

C. The appearance standards are identified in Chapter 91, 91.3.1 "Rules and Regulations".

26.1.2 Distribution of Rules and Regulations
Addresses CALEA 4th edition standards: 26.1.1

Each member of the Department shall be provided copies of the Rules and Regulations and the appearance standards when hired and whenever revisions are implemented.

26.1.3 Disciplinary System

Addresses CALEA 4th edition standards: 26.1.4 A B C, 26.1.2

Any member who violates the oath of office or trust, the laws of the United States, the state of North Carolina or Gaston County, or who violates any provision of Departmental rules, directives, special orders, standard operating procedures, or who disobeys the lawful order of a superior, or who is incompetent in the performance of duties, is subject to disciplinary action.

A. No permanent employee subject to this policy shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement, in writing, setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and employee's appeal rights. Disciplinary action may be taken with an employee when he violates work rules or standards of conduct, or when his work performance is unsatisfactory.

Forms of disciplinary action include oral reprimands, written reprimands, suspension, demotion, discharge, or criminal prosecution. Supervisory personnel shall initiate, and be responsible for, the documentation of corrective and disciplinary actions. However, only the Chief of the Gaston County Police Department may make the decision to

discharge an employee, from a supervisors recommendation.

B. Disciplinary Action Based on Work Performance

This section covers all types of performance-related inadequacies. This policy does not require that progressive warnings all concern the same type of unsatisfactory performance. Warnings related to personal misconduct maybe included in the progressive system for performance-related dismissal, provided that the employee receives at least the number of warnings, regardless of the basis of the warnings, required for dismissal on the basis of inadequate performance. Warnings administered under this policy are intended to bring about a permanent improvement in job performance. Should the required improvement later deteriorate, or other inadequacies occur, the supervisor may deal with this new unsatisfactory performance at the next level of discipline.

1. The following acts comprise a representative, but not exclusive, list of unsatisfactory work performance for which disciplinary action can be taken with employees.

   a. An overall appraisal of unsatisfactory on the performance evaluation

b. Refusal to obey reasonable instructions from supervisors.

c. Work performance deficiencies, such as inattention to, or negligence in, the performance of the duties of one's position, failure to maintain regular hours, or other deficiencies as may be reasonably determined by the employee's supervisor.

d. Use of unauthorized leave

e. Discourteous treatment of the public or other employees

f. Performance of personal work or other outside activities on County time

g. Absence without notification to the employer

h. Claiming paid sick leave for other than authorized sick leave in the Gaston County Personnel Manual.

2. The following procedure shall be utilized to take disciplinary action based on unsatisfactory work performance:

a. A permanent employee whose work performance is not satisfactory shall be issued a verbal warning by his supervisor. The supervisor shall identify the specific problem for the

employee, and discuss and evaluate any extenuating circumstances. The supervisor shall make recommendations for improvement and establish specific goals for the employee and a timetable for improvement by the employee based on the goals set forth. The supervisor shall make a written record of the time, date, and topic of discussion. A copy will be given to the employee and forwarded through the chain of command to the Chief of Police.

b. If the unsatisfactory performance continues over a specified period of time, the supervisor shall issue to the employee a written warning for the continued failure in performance of duties. The supervisor shall record a summary of the problems being experienced with the employee, which shall contain all relevant details of problems. The supervisor shall discuss the written warning with the employee and establish a specific time period for improvement. The supervisor shall also advise the employee of the consequences of continued failure to meet performance requirements, including possible discharge. The supervisor shall obtain the signature of the employee acknowledging receipt of the written warning and shall advise the employee that a copy of the written warning shall be placed in his

personnel file. The supervisor shall distribute copies of the written warning to the employee, to the County Personnel Director to be placed in the employee's personnel file, and through the chain of command to the Chief of Police.

3. If the employee fails to meet the performance requirements within the time period specified, he may be recommended for demotion or discharge by the supervisor to the Chief of Police.

4. The following procedure shall be utilized in the event that it becomes necessary to discharge an employee based on unsatisfactory work performance:

   a. A written summary of the employee's work performance shall be prepared by the supervisor and reviewed by the Chief of Police. The summary shall indicate that the employee has received two (2) previous warnings relating to unsatisfactory performance of duties and is being recommended for discharge based upon the third such warning.

   b. The employee shall be furnished with a statement which sets forth, in numerical order, the specific acts or omissions that are the reasons for the discharge.

c. The employee shall receive a pre-discharge hearing with the Chief of Police and his supervisor at which he may respond to the reasons for discharge.

d. A copy of the discharge statement shall be forwarded to the Personnel Director to be placed in the employee's permanent personnel file.

5. At the time that disciplinary action is taken with an employee, the employee shall be notified of his right to appeal the disciplinary action and the proper procedure to appeal the disciplinary action.

6. Compulsory leave without pay may be used in the event the Chief of Police elects to do so. An employee may be suspended pursuant to the following provisions:

a. Suspension is a compulsory leave without pay authorized by the Chief of Police or in his absence, the acting Chief of Police. A suspension is intended for use in providing time to investigate, establish facts, and reach a decision concerning an employee's actions in those cases where it is determined the employee should not continue work pending a decision. This provision is authorized with the caution that much thought and deliberation be given before taking such action. The

existing facts and circumstances should be weighed carefully. Leaves of absence shall not exceed ten (10) working days when deemed to be necessary by the Chief of Police.

b. The following procedure outlined below shall be followed when it becomes necessary to suspend an employee:

1) Any suspension must be fully documented, before implementation, stating:

a) Beginning date

b) The reasons for the suspension

c) Description of action to be taken in regard to the suspension

d) The timetable for taking additional action (not to exceed ten (10) days.

2) The documentation shall be signed by the employee's supervisor and the Chief of Police.

c. An employee may be suspended without warning for causes relating to personal conduct detrimental to County service, in order to avoid undue disruption of work, to protect the safety of persons or property, or for other

serious reasons. The Chief of Police shall notify the employee, in writing, of the reasons for the suspension within two (2) working days of the action.

d. If an employee is suspended and later proved not to be at fault, he is to be reinstated at his same duties, classification and rate of pay, and he is to receive pay at his regular rate for the time lost.

e. The suspension of any employee shall be concluded within a reasonable time, considering any and all circumstances that have made the suspension necessary.

C. Training and Counseling

It may be determined that while an incident may have resulted in an infraction of controlling regulations, the infraction is not severe enough to rise to the level of reprimand. In such a case, an appropriate alternative to disciplinary action may be directed toward improving employee performance through positive and constructive means.

1. When used as such, counseling or retraining is not considered formal discipline and that fact should be made clear in any formal documentation prepared relative to the incident. Written

records of the counseling or retraining must be maintained, however, either as a part of the formal documentation or as performance notes.

Nothing in this directive prohibits the use of counseling or retraining in combination with the formal disciplinary penalties identified in this section, nor in matters not directly related with infractions of regulations.

2. Gaston County has an Employee Assistance Program (E.A.P.) that is available to all employees of the County. In appropriate cases, prior to implementation of a disciplinary action, a supervisor may require an employee to make an initial contact with the E.A.P. in order to mitigate the disciplinary action or eliminate the need for said action.

D. Procedures and criteria for taking punitive actions in the interest of discipline:

1. Employees may be dismissed, demoted, suspended or warned on the basis of unacceptable personal conduct or other violations set forth in the first paragraph of this Standard. Discipline may be imposed, as a result of personal misconduct, up to and including dismissal without any prior warning to the employee. Disciplinary action should be imposed only after all evidence is considered. The

supervisor considering disciplinary action should, in recommending the nature of the action to be taken, consider among other things, the following factors:

a. The seriousness of the conduct involved

b. The effect of the conduct involved

c. The employee's work record

d. The employee's record regarding disciplinary actions, including, but not limited to, the previous occurrence of the same or similar infractions

e. The employee's knowledge of the rules

f. The reasons for the employee's misconduct

g. Any mitigating factors offered by the employee to explain his conduct.

2. Disciplinary action, including immediate discharge, shall be initiated based upon, but not limited to, the following personal misconduct:

a. Fraud in securing an appointment

b. Dishonesty

c. Drunkenness on duty

d. Use or possession of illegal narcotics or habit-forming drugs

e. Conviction of a felony or conviction of a misdemeanor involving moral turpitude

f. Grossly discourteous treatment of the public

g. Willful and wanton disobedience of a supervisor

h. Misuse of public property

i. Acts during or outside of duty hours which could reasonably impair the effective delivery of public service

j. Falsification of records

k. Reporting to work or working under the influence of an intoxicating beverage and/or other drugs which are not medically prescribed for a specific treatment

l. Participation in any action that would in any way seriously disturb or disrupt the normal operation of the Department or any other segment of local government

m. Willful damage or destruction of public property

n. Willful acts that endanger the lives and property of others

o. Possession of unauthorized firearms or dangerous weapons on the job

p. Refusal to accept, or failure to carry out, a reasonable and proper assignment from a supervisor (insubordination).

q. Acceptance of gifts or gratuities in exchange for favors or influence

r. Disclosure of confidential information from official records

s. Engaging in incompatible employment or serving a conflicting interest

t. Taking part in political activities that are prohibited by the Gaston County Personnel Manual

u. Sexual harassment of employees, clients, or public patrons as defined and regulated by Policy 12 of the Gaston County Personnel Manual.

3. Supervisors at all levels in the Department's chain of command have the authority for the administration of the disciplinary process. First line supervisors have the continuing opportunity to observe employee conduct and appearance and

shall administer discipline where it will be most effective, whether the discipline is positive, disciplinary, or punitive.

a. Punitive discipline generally shall be imposed in a progressive manner from minimum to maximum, but also, when appropriate, may be imposed to the maximum limit at any time for any incident.

b. Disciplinary action may be imposed by an employee's supervisor, or the Chief of Police. An employee may not be discharged without a pre-discharge hearing. The pre-discharge hearing shall consist, minimally, of providing a statement of misconduct to the employee and allowing the employee an opportunity to respond. The employee shall be advised in writing, by the Chief of Police, of his rights of appeal under this policy.

E. The Standardized Awards Program Qualifications

1. The Awards Program shall consist of the following:

a. Citizens Award Program

1) Citizen of the Year Award

2) Outstanding Service by a Citizen Award

3) Volunteer of the Year Award

4) Police Explorer of the Year Award

5) Gaston County Community Watch Association Member of the Year Award

6) Chief's Commendation Award(s)

b. County Police Employee Award Program

1) Sworn Employee of the Year Award

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26.1.4 Role of Supervisors
Addresses CALEA 4th edition standards: 26.1.5

A. The Chief of Police shall review all submitted reports and evidence prior to making a determination in the disciplinary process. His responsibilities include:

1. Reviewing recommendations for awards and disciplinary actions

2. Sustaining or reducing the recommended action

3. Imposing the forms of punitive discipline identified in Standard 26.1.3 of this directive.

B. The Professional Standards Supervisor shall be responsible for the review of all disciplinary investigations in the Department and shall report directly to the Chief of Police.

C. All Supervisors shall be responsible for detecting those instances and actions when positive or negative disciplinary actions are warranted for members under their immediate or indirect supervision. These responsibilities include:

1. Investigating allegations of employee misconduct when within the scope of their authority and responsibility

2. Counseling employees to improve job performance or correct minor infractions of Departmental rules, regulations, and procedures

3. Identifying training needs as a function of the disciplinary process

4. Implementing disciplinary action approved by the Chief of Police.

26.1.5 Supervisory Authority
Addresses CALEA 4th edition standards: 26.1.5

A. Final disciplinary authority and responsibility for Departmental members rest with the Chief of Police. All supervisors are held responsible for any discipline administered at any level below them within their span of authority. Supervisors may exercise the following disciplinary measures with members under their control:

1. Supervisors

   a. Change of duty assignment within their span of supervisory control

   b. Verbal Reprimand

   c. Written Reprimand

   d. Recommend a higher level of discipline

   e. Emergency relief from duty.

2. Major and Captain

   a. Change of duty assignment within their span of supervisory control

   b. Verbal Reprimand

   c. Written Reprimand

   d. Recommend a higher level of discipline

e. Emergency relief from duty.

3. Chief of Police

a. Change of duty assignment

b. Verbal Reprimand

c. Written Reprimand

d. Emergency relief from duty

e. Suspension

f. Demotion in rank

g. Dismissal from the Department.

B. Whenever improper conduct of a member is observed by any supervisor, it shall be the responsibility of that supervisor to inform the offending member's supervisor for possible disciplinary action.

1. If the misconduct is very minor, such as a minor infraction of procedures, or a case of poor judgement which has not significantly impeded effective Departmental operations, the supervisor is authorized to take immediate corrective action in the form of counseling.

2. An oral reprimand may be given by any first-level supervisor. It shall be the responsibility of that supervisor to inform

the offending member's supervisor for possible disciplinary action.

3. If the misconduct is serious and the supervisor determines that Administrative Review is necessary, the procedures identified in OPS-52, Section 52.3.2 shall be followed.

4. If the misconduct is very serious, such as a violation of criminal law, gross negligence involving loss of life or potential loss of life, intoxication on-duty, gross insubordination, or when deemed to be in the best interest of the Department, the supervisor may impose an emergency suspension in addition to the procedure identified in #3 above. The division Major shall be immediately notified in such instances. (Refer to Chapter-52)

   A Supervisor may relieve a member from duty on an emergency basis when in the best interest of the Department. Such relief from duty will remain in effect until 0900 hours on the next business day, unless otherwise directed by competent authority. At that time, the relieved member and the supervisor effecting the relief will report to the office of the Chief of Police.

26.1.6 Dismissal Notification

Addresses CALEA 4th edition standards: 26.1.7

A B C

A. If an investigation of employee misconduct results in termination from the Department, the employee shall receive written notice, which will contain the following information:

1. The reason for the termination (charges and specifications)

2. The effective date of termination

3. The status of fringe and retirement benefits after termination

4. A statement as to the content of the employee's personnel file relating to the termination.

B. This section does not apply to entry level probationary officers.

26.1.7 Allegation Findings

Addresses CALEA 4th edition standards: 52.1.9

A. When an administrative Review process investigation has concluded, a "conclusion of fact" for each allegation will be clearly stated and will identify the following concerns when applicable:

1. Proper conduct

2. Improper conduct

3. Policy failure

4. Insufficient evidence

5. Unfounded complaint.

B. At the conclusion of an Administrative Review process, the Professional Standards Supervisor shall conclude his report by classifying the disposition into one of the following categories in accordance with Policy 52.3.6:

1. Unfounded: The investigation indicates that the alleged act(s) or omission(s) complained of did not occur or did not involve police personnel.

2. Exonerated: The investigation indicates that the act(s) or omission(s) did occur, but were justified, lawful, and proper.

3. Not Sustained: The investigation fails to discover sufficient evidence to clearly prove or disprove the allegation(s) made against the employee.

4. Sustained: The investigation disclosed sufficient evidence to clearly prove the allegations.

26.1.8 Records Maintenance
Addresses CALEA 4th edition standards: 26.1.8

A. Reports and supporting documents that relate to an Administrative Review Investigation will be retained by the Professional Standards Captain and will not be placed in the member's personnel file in accordance with Policy 52.2.7.

B. The notification of disciplinary action will be placed into the member's personnel file.

C. Notification of Disciplinary action findings shall remain in the member's personnel file indefinitely.

26.1.9 Appeal Process
Addresses CALEA 4th edition standards: 26.1.6

A. Any employee or former employee of the Gaston County Police Department may appeal a demotion, suspension, or discharge by notifying the Chief of Police in writing, within three (3) working days of the receipt of the notice of disciplinary action, of his desire to appeal. The employee's request for an appeal should set forth the grounds upon which the employee seeks a reversal of the disciplinary action.

B. The Civil Service Board shall review disciplinary action taken against any officer, upon the written request of the officer for a review.

C. The Chief of Police shall, within three (3) working days of receipt of the notice of appeal, file a copy of the written statement notifying the employee of the disciplinary action and a copy of the employee's request for appeal with the County's Civil Service Board.

D. The Civil Service Board shall, upon the written request of any officer against whom disciplinary action has been taken, conduct a hearing into the formal charges against the officer and shall make written findings of fact regarding the charges against the officer. The officer, against whom charges have been filed, shall be given ample opportunity at a disciplinary hearing to be heard in his own behalf.

E. The Civil Service Board shall report its findings and conclusions to the County Manager with its request that the County Manager implement the necessary action in accordance with its conclusions.

F. The Civil Service Board shall find facts upon which it will base a decision that the officer against whom charges have been filed shall either be reinstated, suspended, demoted, discharged, or exonerated of the charges against him.

G. The County Manager shall review the findings and the decision of the Civil Service Board. The County Manager may, no more than three times, remand the action to the Civil Service

Board with directions for further findings prior to the final disposition of the Civil Service Board's decision, or if there is no reason for additional hearings before the Civil Service Board, he shall direct the Chief of Police to implement the order of the Civil Service Board.

H. The Chairman of the Civil Service Board shall conduct the meetings and hearings of the Civil Service Board in accordance with the rules, policies, and procedures adopted by the Gaston County Board of Commissioners.

I. The Secretary shall keep the minutes of the proceedings of the Civil Service Board and shall be the custodian of all the papers and records pertaining to the business of the said Board.

J. Non-sworn employees will follow the guidelines in the Gaston County Personnel Policy Manual

26.1.10 Sexual Harassment
Addresses CALEA 4th edition standards: 26.1.3

The Gaston County Police Department does not condone or tolerate sexual harassment by County employees. Any County employee found guilty of sexual harassment shall be subject to immediate disciplinary action, which may include discharge. This policy and the reporting procedures for instances of sexual harassment are clearly stated in

the Gaston County Personnel Manual. Excerpts from that manual follow:

Sexual Harassment

1. Sexual harassment is recognized by the Equal Employment Opportunity Commission as a violation of Title VII of the Civil Rights Act of 1964. EEOC regulations define sexual harassment as follows:

   Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Gaston County shall not condone or tolerate sexual harassment by County employees. Any County employee found guilty of sexual harassment shall be subject to immediate disciplinary action which may include discharge. Furthermore, Gaston County shall not tolerate sexual harassment of clients of County agencies or patrons of County facilities. If County employees experience or

have knowledge of sexual harassment by County employees, they are encouraged and expected to report such abuses to management.

3. When a complaint regarding sexual harassment is received, it shall be immediately investigated and appropriate action taken. It is acknowledged that presentation of sexual harassment grievances to immediate supervisors or Department Directors may be difficult for an employee. Although employees are encouraged to direct grievances to their immediate supervisors as set forth in Policy 12 *(of the personnel manual)*, an employee wishing to state a grievance concerning sexual harassment may do so directly to the Personnel Commission, *(through the Gaston County Personnel Director)* as provided for in Policy 12. *(of the personnel manual)*.

4. The Personnel Commission shall issue findings of fact and render a decision in writing in regard to the grievance or disciplinary action being reviewed. All decisions of the Personnel Commission are final.

5. The Personnel Commission shall adopt such procedures as are necessary to the orderly conduct of its meetings.

6. The Personnel Commission shall keep an accurate record of all its proceedings, findings and recommendations.

Gaston County Police Department
Policy And Procedure Manual Chapter..... 26

By The Order Of: /s/ W.J. Farley
W.J. Farley
(Acting) Chief of Police

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